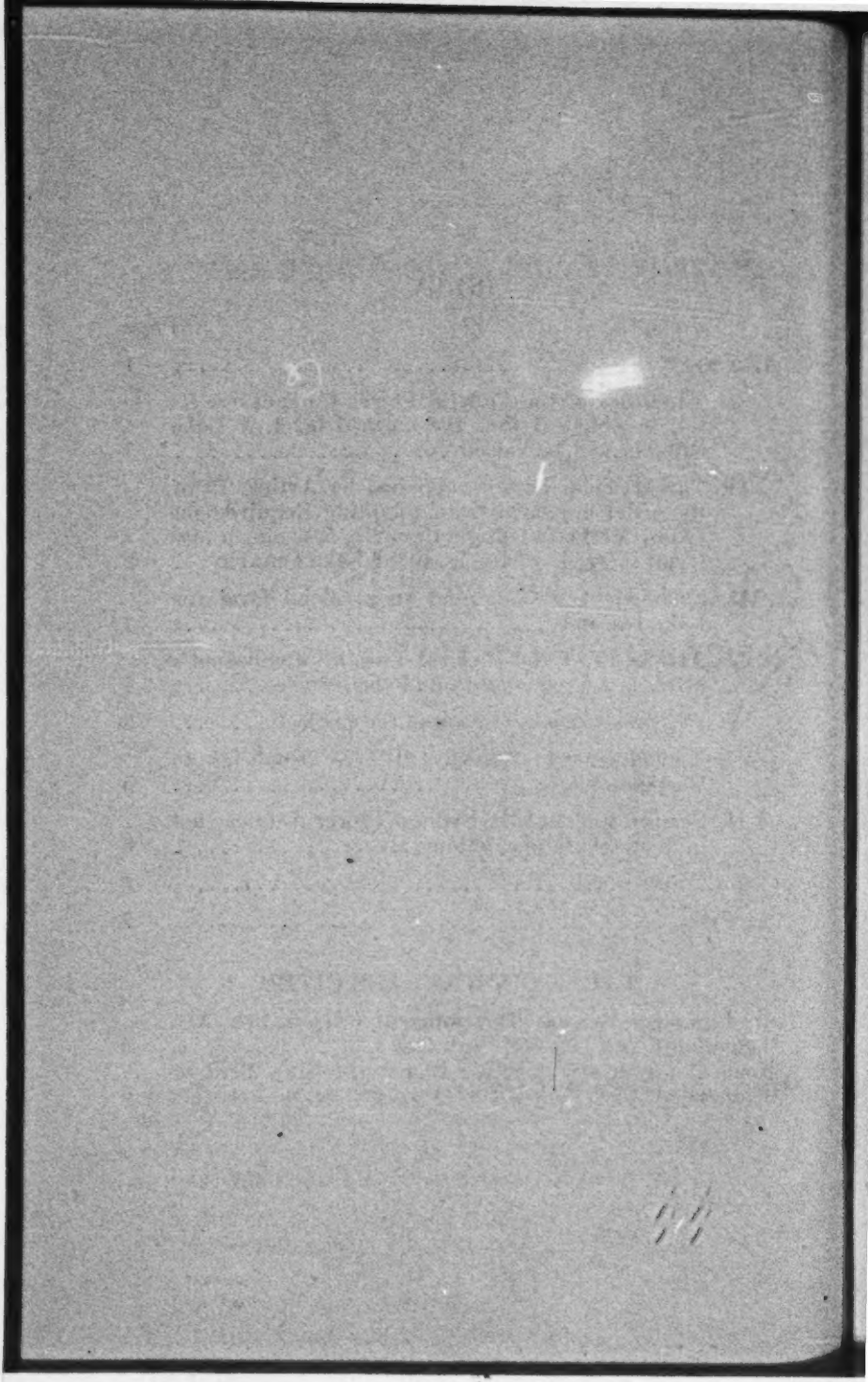
INDEX

	Page
ARGUMENT	1
I. The order of the Federal Power Commission itself established that the natural level of Lake Ontario will be raised	1
II. The artificial level established by Article 19 of the order appealed from, adopting Requirement (a) of Method of Regulation No. 5, means a material increase of the levels of Lake Ontario	2
III. Respondent has adopted an artificial level for Lake Ontario	4
IV. Article 19 of the Federal Power Commission's order is a fixed condition of the license	4
V. Petitioner does not oppose the project	5
VI. Amendment to Seaway Bill is beneficial to Respondent	5
VII. Section 10 (c) of the Federal Power Act does not give adequate protection	6
CONCLUSION	6
APPENDIX	7

TABLE OF STATUTES CITED

St. Lawrence Seaway Development Corporation Act, Section 3 (a) (2), (68 Stat. 92)	5
Federal Power Act, Section 10 (c) (41 Stat. 1063, as amended, 16 U.S.C. 791-823)	6



IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 772

LAKE ONTARIO LAND DEVELOPMENT AND BEACH PROTECTION ASSOCIATION, INC. (Also Known as Lake Ontario Land Owners and Beach Protective Association, Inc.), *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

and

GREAT LAKES-ST. LAWRENCE ASSOCIATION, POWER AUTHORITY OF THE STATE OF NEW YORK, *Intervenors.*

REPLY BRIEF

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner is filing this reply brief in answer to Respondent's brief, dated May 27, 1954.

ARGUMENT

I.

The Order Of The Federal Power Commission Itself Established That The Natural Level of Lake Ontario Will Be Raised.

For the Respondent, therefore, to contend that there is no evidence before this Court that the project will raise the natural levels is contrary to the plain language of the

order itself. The Federal Power Commission adopted lock, stock and barrel Method of Regulation No. 5 by Article 19 of its order. It says in so many words that its object is to raise the natural level of Lake Ontario and to give Petitioner the fluctuations of levels which have existed in the past, meaning those caused by Gut Dam. Paragraphs (a) "(A. 379)", (c) "(A. 379)" and (g) "(A. 380)" of Method of Regulation No. 5.

It is one thing for Respondent to say that it is not responsible for Method of Regulation No. 5 and to admit that Method of Regulation No. 5 is unfair and unjust to Petitioner, as the last paragraph of the press release quoted in Appendix B, Respondent's brief (p. 29) implies, but quite another thing for the Respondent to claim that Method of Regulation No. 5, adopted and approved by it, does not call for the raising of lake levels.

II.

The Artificial Level Established By Article 19 Of The Order Appealed From, Adopting Requirement (a) of Method of Regulation No. 5, Means a Material Increase of the Levels of Lake Ontario.

(1) Respondent contends that Plate No. 9 is "inconclusive". This was not Petitioner's exhibit but was prepared by the Canadian engineers for the very purpose of showing the effect of Gut Dam on the levels of Lake Ontario and was so prepared before any dispute arose as to the effect of Gut Dam.

(2) In addition to Plate No. 9, Docket No. 68 referred to in Article 19 of the order appealed from, contains the following testimony of Gail A. Hathaway, United States Member of the International Lake Ontario Board of Control, given at Rochester, New York, on November 17, 1953, in respect to Plate No. 9. The following appears at page 49:

> "Mr. Forsyth: So far as the testimony before this Commission to this day is concerned, the record shows

that Gut Dam did raise the natural level of Lake Ontario. Is that the fact?

Mr. Hathaway: That is correct.

Mr. Forsyth: All right.

So when you talk about Method No. 5 is designed to give us no greater maximums than we had in the past, you mean no greater maximums with Gut Dam in; is that correct?

Mr. Hathaway: That was the premise of the Statement." Again, in the report of the United States Army Engineers, Great Lakes Division, U. S. Lake Survey, dated February 1952, a public document, under the title "Variations in Great Lakes Levels", at page 23, appears the following:

"Subject Gut Dam in the St. Lawrence River * * * * has caused an average ultimate rise in levels of that Lake in the order of six inches."

(3) The Department of External Affairs of the Canadian Government has admitted in its letter of October 25, 1951, addressed to the American Embassy at Ottawa, as appears by a summary of that note by the United States Department of State, dated February 13, 1952, that Gut Dam artificially raised the levels of Lake Ontario. That admission is in the following language:

"The net effect of all these works at periods of high water level is then stated to be as follows:

Effect of Gut Dam	plus 7¾	inches
Effect of Ogoki and Long Lac	plus 3	inches
Effect of Chicago Diversion	minus 2	inches
Net Effect	plus 8¾	inches."

III.

Respondent Has Adopted An Artificial Level For Lake Ontario.

Respondent at page 19 of its brief, admits that the protection given by Paragraph (a) of the order of approval of the International Joint Commission, adopted in Article 19 of the order appealed from, is deleted from the provisions of the order which controlled lake levels, namely, Paragraph (i) Respondent still contends however that the benefits of the protection of Paragraph (a) are contained in the last sentence of Paragraph (d). Respondent quotes at page 19 the last sentence of Paragraph (d) as follows:

"* * * any change in levels."

Petitioner urges that the quotation confirms its position. Protection is only given by the last sentence of Paragraph (d) above for any "change in levels" above the artificial levels created by Gut Dam. The property of Petitioner appropriated by the difference between natural levels and the artificial levels is admittedly taken without compensation.

IV.

Article 19 of the Federal Power Commission's Order Is A Fixed Condition of the License.

Respondent repeatedly asks this Court to deny the petition for certiorari on the grounds that the International Joint Commission is still studying Method of Regulation No. 5 and may in the future change it. In this connection Respondent quotes a press release of the International Joint Commission, dated January 28, 1954, and attaches the same as Appendix B to its brief. In this regard Petitioner desires to point out to the Court that the order of October 29, 1952 of the International Joint Commission is now the law of this case, as adopted by Article 19 of the order of the Federal Power Commission. In order to change

Method of Regulation No. 5, a majority vote of the Commission is required. Three of the Commission's members are Canadians and three are Americans. Method of Regulation No. 5, as it now stands, clearly gives to the Canadian interests down the river advantages which they did not have in nature. In view of this fact, it will be extremely difficult for the Canadian members to vote for a change. Petitioner does not feel it should be a charity patient of the Canadian members of the Commission so far as the appropriation of its property without compensation is concerned.

V.

Petitioner Does Not Oppose The Project.

Petitioner has no quarrel with the argument of Respondent as to the possible benefits of the power and seaway project. Petitioner does object, however, to being the "forgotten man". Regardless of which levels are adopted in the interests of the overall picture, Petitioner has a right to insist on compensation for its property taken by the establishment of an artificial level higher than the natural level, and for indemnity for any damage caused in addition thereto.

VI.

Amendment To Seaway Bill Is Beneficial To Respondent.

Respondent lays great stress (R. brief, page 12) on the amendment to the St. Lawrence Seaway Development Corporation Act, Public Laws 358, 68 Stat. 92, which, it is claimed, was procured at the instance of Petitioner. The purpose and effect of that amendment is to save this great project in the event this Court feels that the order appealed from should be remanded for such amendments as would adequately protect and indemnify this Petitioner.

VII.

Section 10(c) of the Federal Power Act Does Not Give Adequate Protection.

Respondent refers to Article 10(c) (R. brief, page 10) of the Federal Power Act as providing damages for this Petitioner by the license. The principal trouble with this provision is that the order finds the property taken by the artificial level of Gut Dam is not Petitioner's property. Clearly no damages are payable except for flooding in excess of the artificial level of Gut Dam under the order of the Federal Power Commission.

CONCLUSION

Wherefore, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit, and upon such review the judgment of said Court of Appeals for the District of Columbia Circuit be vacated, reversed, and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

Respectfully submitted,

CLAYTON L. BURWELL
920 Southern Building
Washington 5, D. C.

WALTER S. FORSYTH
1025 Genesee Valley
Trust Building
Rochester, N. Y.
Counsel for Petitioner

Of Counsel:

MURPHY, DUIKER, SMITH & BURWELL
920 Southern Building
Washington 5, D. C.

WALTER S. FORSYTH & SON
1025 Genesee Valley Trust Building
Rochester, N. Y.

APPENDIX

Summary of Note Dated February 27, 1952 From The Canadian Department of External Affairs To The American Embassy at Ottawa Concerning High Level of Water in Lake Ontario.

The Canadian note refers to the note of October 19, 1951 from the Ambassador of the United States concerning complaints from landowners along the southern shore of Lake Ontario that damage has been caused to land and property by erosion and inundation as a result of the high level of the lake, which is ascribed, in part, by those making the complaints, to the effect of the Gut Dam.

Reference is then made to the Canadian reply of October 25, 1951 concerning the investigation made by the Canadian officials concerned. It is stated that this investigation shows that, although the level of the lake has been unusually high on several occasions during the past five years or so, it has also been abnormally low on some occasions in recent years. The high water levels in recent years are, for the most part, due to natural causes, the result of greatly increased precipitation in the entire Great Lakes watershed, which appears to vary in irregular cycles, and the consequent increased run-off into the Great Lakes. Moreover, the maximum daily mean water level recorded in recent years (246.69 feet above sea level on July 30, 1947) was exceeded during 234 days between 1858, the earliest year on record, and 1900 (i.e. during the period before the Gut Dam was built), with a maximum recorded elevation of 247.38 feet above sea level on May 22, 1862.

With regard to the effects of the Gut Dam on the situation, the following excerpts from the report made as a result of the investigation are quoted:

> "*Location.* The Gut Dam is located in the St. Lawrence River about 7 miles below Prescott and extends across the channel between Galop Island and Adams Island.
>
> "*Purpose.* The Dam was built in order to: 'shut off a side or cross current in the Galop Rapids and thereby render that channel safer for the passage of vessels. A secondary object is to raise the water in the upper entrance of the Galop Canal.' "

"*Effect of Dam on Flow Distribution.* Prior to the construction of the Gut Dam 54.3% of the total flow of the River at times of mean flow passed north of Galop Island, 12,000 cubic feet per second of which passed through the channel between Galop and Adams Islands. At the present time 52% of the flow passes down the North channel.

"*Effect of Dam on Water Levels.* Closure of the Galop-Adams Island Channel has resulted in a raise in water level of 0.50 feet (6 inches) in the water level at mean stage at the upper entrance to the Galop Canal and 0.45 feet (5½ inches) at mean stage on Lake Ontario (Oswego, N. Y.).

"The maximum daily mean water level recorded at the upper entrance to the Galop Canal since the Dam was built was elevation 246.69 feet (July 30, 1947). This level was exceeded during 234 days between 1858, the earliest year of record, and 1900, with a maximum recorded elevation of 247.38 (May 22, 1862).

"The maximum monthly mean level recorded at the upper entrance to the Galop Canal since the Dam was built was elevation 246.34 (July 1947). This mean level was exceeded during 16 months during the period 1858 to 1900, with a maximum monthly mean of 246.84 in May 1862.

"During the period of low levels occurring in 1934, '35 and '36 the depth available for navigation in the St. Lawrence Canals was governed by the depth on the upper sill of Lock 24 and reached a minimum of 11.8 feet on November 26, 1934. If the Gut Dam had not been in place the depth of water on the upper sill of Lock 27 (the upper entrance lock of the Galop Canal) would have been the governing depth on the St. Lawrence Canals and would have fallen to a minimum of 11.7 feet on November 20, 1934. Of greater importance than the decrease in the available depth is the increase in the number of days during the low water period on which the full 14-foot depth would not have been available—from 386 occurrences under present conditions to 785 occurrences with the Gut Dam removed.

"*Effect of Dam on Currents.* At the present time certain vessels navigate upstream past Iroquois and

enter the Galop Canal at Lock 28. If the Gut Dam were removed the velocities at mean stage at the lower entrance to Lock 28 would be increased by approximately 5%. Whether this is a serious matter or not could only be determined by consultation with the pilots in charge of these vessels."

From these statements the Canadian note expresses the view that it is clear that the net effect of the Gut Dam on the level of Lake Ontario at mean stage is 0.45 feet (5½ inches). The effect of the Gut Dam is slightly greater at periods of high water level but the greatest effect, occurring in May 1951, was 7¾ inches. The raising of the level by the Dam has been in effect in periods of both high and low levels during the half century since the Dam was built. Moreover, the need for the Dam to increase the availability of a sufficient depth of water for navigation in the St. Lawrence River—a use of boundary waters accorded a high priority under the Boundary Waters Treaty of 1909—has been evident on many occasions, as noted in the report.

As the effect of other diversions on the level of Lake Ontario is involved, the following paragraphs from the Canadian report with respect to the net effect of these diversions and of the Gut Dam, are quoted:

"The quantity of water diverted from the Hudson Bay Drainage Area into the Great Lakes Basin via the Long Lac and Ogoki River diversions varies from time to time. To date it has been assumed that on the average the total amount added to the Great Lakes Drainage Basin will be 5,000 c.f.s. The effect of this additional water on the level of Lake Ontario at times of mean flow is 0.25 feet (3 inches)."

"The amount of water diverted from the Great Lakes Drainage Basin via the Chicago Drainage Canal is now regulated by a decree of the Supreme Court of the United States, dated April 21, 1930, and is limited to an annual average of 1,500 c.f.s. in addition to domestic pumpage. This latter amount can be taken at about 1,800 c.f.s. The effect of the total diversion of 3,300 c.f.s. on the water level of Lake Ontario at times of mean flow is 0.16 feet (2 inches)."

"The net effect of the Gut Dam, the Long Lac and Ogoki diversions and the Chicago diversion on the

water level of Lake Ontario at times of mean flow is as shown below:

Works	Amount of Diversion c.f.s.	Effect on W.L. of Lake Ontario
Gut Dam		+ 0.45 feet
Long Lac & Ogoki Diversions	5,000	+ 0.25 feet
Chicago Diversion	3,300	— 0.16 feet
		+ 0.54 feet (6½ inches)"

The net effect of all these works at periods of high water level is then stated to be as follows:

"Effect of Gut Dam	+ 7¾ in.
Effect of Ogoki and Long Lac (5,000 c.f.s.)	+ 3 in.
Effect of Chicago Diversion (3,200 c.f.s.)	— 2 in.
Net Effect	+ 8¾ in."

By way of recommendation, the Canadian note states that the report of the Canadian officials contains a statement that the construction of the St. Lawrence Seaway and Power Project in the International Section of the St. Lawrence River will provide for the regulation of outflow and level of Lake Ontario at the proposed dams and power-houses. This is considered to be the most effective way of dealing with the problem.

The Canadian note concludes with the following statement:

> "The additional suggestion that the question of the levels of the Great Lakes be referred to the International Joint Commission for study and recommendations will require further consideration by the Canadian Government and this will form the basis of another communication at an early date."